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No. 08-204

Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES

DAWN V. MARTIN, ESQUIRE
Petitioner

v.

HOWARD UNIVERSITY,
HOWARD UNIVERSITY LAW SCHOOL
and
ALICE GRESHAM BULLOCK, ESQUIRE
Respondents.

ON PETITION FOR WRIT OF *CERTIORIARI*
TO THE UNITED STATES COURT
OF APPEALS FOR THE D.C. CIRCUIT

PETITIONER'S REPLY TO RESPONDENT HOWARD UNIVERSITY'S OPPOSITION TO PETITION FOR WRIT OF *CERTIORIARI*

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ARGUMENT

I. Howard University Distracts from the Precedent Setting Legal Arguments Presented by this Case by Blatantly Misrepresenting the Facts

Howard's legal arguments are difficult to find within the "muck and mire" of its flagrantly false representations of the record.[1] As the D.C. Court of Appeals cautioned, in another sex discrimination case brought by a Howard University professor:

> ...[a]n unscrupulous employer who has engaged in discriminatory practices may sometimes falsely depict a person with a legitimate complaint as a meritless troublemaker; the effects of the employer's wrongful conduct may them be compounded by the undeserved *ad hominen* condemnation of and calumny against a plaintiff who deserves better.

Carter-Obayuwana v. Howard University, 764 A.2d 779, 793 (D.C. 2001).[2]

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[1] Frederic D. Cooke, Esquire, representing Alice Gresham Bullock, filed a separate Brief. He did not join in Howard's misconduct. Prof. Bullock waived her right to file a Brief in Opposition to *Certiorari*. This Court's docket incorrectly indicates that Prof. Bullock is also represented by Roberta Y. Wright. In fact, Ms. Wright represents the *National Organization for Women* (NOW), the *National Association of Women Lawyers* (NAWL) and other women's advocacy groups that seek to late file an *Amicus* Brief in support of Ms. Martin's Petition for Certiorari.

[2] Howard has a pattern of long, "contentious" litigation with its employees. See, e.g., *Summers v. Howard University,* WL 751316 at *4, 5 (D.D.C. 2006) (finally settled).

"[A] lie is evidence of consciousness of guilt." *Aka v. Washington Hospital Center*, 156 F.3d 1284, 1293 (D.C. Cir. 1998).

Ms. Martin cannot sacrifice legal arguments in order to correct all of the false statements or the "mudslinging" in which Howard continues to engage. This Reply Brief therefore focuses on the legal issues at stake for all women and Title VII plaintiffs generally.[3]

II. *Martin* Squarely Presents the Issue of whether Women can be Fired for being Stalked in the Workplace

A. The Disparate Impact Analysis should be Applied to Workplace Stalking

Howard claims that Ms. Martin cited no authority for arguing that stalking constitutes sexual harassment, as a matter of law;[4] however, she has cited *many* Title VII cases supporting this argument, including the holdings of this high Court in *Dothard v. Rawlinson,* 433 U.S. 321, 329 (1977) (height and weight requirements discriminated on the basis of sex, based on their adverse impact on women) and *Oncale v. Sundower Offshore Services*, 523 U.S. 75, 118 (1998) (sex discrimination cases are established where offensive conduct affects "*primarily women*" even if it also affects some men).[5]

Courts have long recognized that stalking is one of the most egregious forms of sexual

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[3] Ms. Martin is compelled, however, to address Howard's baseless, irrelevant attack upon her daughter, who has established her own name as a published author and a university instructor, at the age of twenty-four.

[4] Howard Brief at 14-15. Howard then contradicts itself by acknowledging that she cited *Oncale*.

[5] Pet. at 11-12, 23.

harassment.[6] Howard argues that the D.C. Circuit's holding that Prof. Martin was not protected by Title VII was "fact bound" and did not present the Court with the issue of whether stalking is *per se*, sexual harassment. Howard's argument is simply illogical.

By holding that *stalking did not* constitute sexual harassment in this case, the D.C. Circuit *did* issue a ruling that stalking does not constitute sexual harassment, *per se*. Stalking cannot be sexual harassment *per se* for everyone *except* Ms. Martin.

Prof. Martin was stalked by Leonard Harrison in Howard's law school. Harrison was searching for the embodiment of a fictional female character in a book, written by Prof. Derrick Bell, to become his wife.[7] The jury specifically found that Harrison's harassment of Prof. Martin was severe and pervasive. Pet. 10; A-127. In fact, the jury found in Ms. Martin's favor with respect to *every* element of her claim except for the question of whether Harrison targeted her based on her gender. *Id.*

It was the jury's misunderstanding of the *legal definition* of sexual harassment -- not the facts -- that destroyed Ms. Martin's sexual harassment

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[6] Pet. at 22.

[7] Howard complains that Prof. Derrick Bell's affidavit should not have been included in the Appendix because it had no opportunity to cross-examine Prof. Bell; however, Howard never moved to strike it. The affidavit was part of the Appendix before the D.C. Circuit and in Ms. Martin's 2002 *Motion for Summary Judgment*, as well as post trial motions for judgment. Howard *elected not to depose Prof. Bell* and even filed a motion to preclude Prof. Bell from testifying at trial – which Judge Hogan granted. Prof. Bell's exclusion was one of the evidentiary issues that Ms. Martin appealed; thus, the affidavit was properly included in the Appendix.

and retaliation claims. It is therefore the law – not the facts -- that must be defined by this Court.

Martin can either stand as precedent, holding that a woman can be stalked in her workplace and fired for reporting it, or it can be reversed and set precedent that furthers the Title VII purpose of eliminating sexual harassment in the workplace -- whether the harasser is an employee or a non-employee workplace stalker. *Pet.* at 20-23.

B. Title VII Retaliation Cases do not Distinguish between being "Fired" and "Not Renewed"

Howard refused to address the cases cited by Ms. Martin, holding that whether a Title VII action "is considered a termination or a refusal to re-hire, ... it is a cognizable injury for the purpose of ... Title VII." *Walker v. Board of Regents of University of Wisconsin System*, 300 F. Supp. 2d 836, 853 (W.D Wis. 2004). Pet. at 8-9, fn. 9; 32.

The magistrate judge who dismissed Ms. Martin's retaliation claims treated her non-renewal as a "firing," a "dismissal," and "loss of her job" (A-92). *Pet.* at 32, fn. 32 (A-88) He also stated: "[p]laintiff lost her job and it was given to Cunningham." (A-82) *Id.* Howard simply ignored the case law, as well as the lower court holdings.

Howard improperly argues that Ms. Martin's retaliation claims are dependant upon her breach of contract claim. They are not. They are independent claims with different elements.

C. A Woman Stalked in her Workplace should not be Limited to Remedies under Negligence Law

Howard states:

> Martin seems to be asking this Court to extend Title VII to "explicitly protect[s] an employee from being fired for being stalked." Pet. App. 11.

Howard Brief at 18.

Howard has half-quoted and mis-cited Ms. Martin's Petition, which actually reads:

> There is no federal statute that explicitly protects an employee from being fired for being stalked.

Pet. at 11.

Howard argues that women stalked at work should be limited to the negligence remedies available under premises liability and workplace safety matters. *Id.* Howard cites no authority for its position; moreover, such limitations, in most states, would preclude any recovery where there was no *physical* injury. Many states fail to recognize any claim of *negligent infliction of emotional distress*, and where it is permitted, the cases are extremely difficult to establish.

The stalker would have to physically attack the victim before any claim would attach. Without a physical injury, the only injury would be the

emotional distress caused by stalking – or harassment, as stalking is defined.[8]

In addition, the common law has not recognized an anti-retaliation provision for reporting negligence; therefore, common law negligence would provide no remedy for a woman who was fired for asking for protection against a stalker .[9]

D. Judge Hogan Improperly Refused to Instruct Jurors that a Plaintiff Need not Use the Words "Sexual Harassment" to Invoke Title VII

Howard argues that Judge Hogan provided sufficient jury instructions when he told the jury that there were no "magic words" to invoke Title VII; however, these words alone lacked meaning, without context. Howard repeatedly argued that Ms. Martin's claim must be defeated because she entitled her memos "Security Problem on Campus" rather than "Sexual Harassment." Jurors needed to be told that it was not necessary for Prof. Martin to use the precise words "sexual harassment" to sustain her claim. Judge Hogan flatly refused to provide that instruction.

Howard refuses to acknowledge that complaints about harassment by non-employees are not reported or remedied in the same manner as harassment by employees. *Pet.* at 20-23.

Prof. Martin first reported Harrison's harassment to the administration, campus security, colleagues, and police verbally, on November 20th and

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[8] *Pet.* at 22.

[9] In some states, however, the law of wrongful termination, in violation of public policy, is evolving to fill the void where there is no statutory protection against termination. Pet. at 36.

21st. *Id.* She discussed it with administrators,[10] colleagues,[11] staff members[12] and law enforcement officers[13] who *all* readily recognized that Harrison's stalking was based on her status as a woman. *See Pl's Reply MJSexH* #483 at 1-7 (**JA**10,152-10,158). targeted. Stating what was obvious to all in her memoranda thereafter would have been like explaining to Dean Bullock that *water is wet*.

Prof. Martin's memoranda were not intended to be *legal Briefs* or to educate Dean Bullock (an attorney) on the law of sexual harassment. They were entitled "Security Problem on Campus" to focus on *eliminating the danger at hand*. Howard's Title VII liability attached only when it failed to take reasonable steps to keep Harrison out of the workplace. Prof. Martin could not have known that Dean Bullock was *not even trying* to protect her until she saw a pattern of *retaliation*, rather than the promised *protection*. Prof. Martin then worked *both* in fear of the stalker *and* of losing her job. Tr. #490 at 18:7-98:22 (**JA**12,489-12,569).

In *Maupin v. Howard County*, No. 13C05062062 (verdict July 2, 2007) (Howard County, Maryland Circuit Court), a call from a purported Ku Klux Klan member to an African-American high school teacher

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[10] *Pl's Facts* ¶38 (**JA**5815-5816); Pl's Tr. Exhibit 8B (**JA**14,407); Tr. #490 at 50:5-51:4 (**JA**12,521-12,522).

[11] Tr. 1666:2-15 (**JA**12,460); MJSex H at 13 (**JA**9,733), 17 #461, fn. 17 (**JA**9,737). Prof. Taslitz' comment that Prof. Martin would be "*raped* and killed" by Harrison if the matter were left up to campus security (*Id.*) even found its way into Prof. Martin's nightmares. Tr. #490 at 47:1-9 (**JA**12,518)

[12] MJSex H at 17 (**JA**9,737); Pl's MSJ #273 Ex. X Bruner depo at 137:4-13 (**JA**6,808).

[13] Pl's MSJ #273 Ex. P Sirleaf depo at 36:22-37:3 (**JA**6,658), 137:5-140:19 (**JA**6,698), 21:22-22:5 (**JA**6,652), 99:22-102:3 (**JA**6,683); *Pl's Opp to Def's MSJ* #283 at 4 (**JA**8,048).

was one factor creating a hostile work environment for her. *Id.* If employers are permitted to ignore threats from third parties, the harassed employee may be compelled to leave the workplace.

Such tactics are reminiscent of the school desegregation cases wherein African-American students were attacked by White supremacists and intimidated into leaving the schools they had integrated. It would be a sad irony if *Howard University* removed Title VII protection from plaintiffs like Ms. Maupin, threatened by racists in their workplaces. Similarly, an employer must not be permitted to rid itself of *women* by failing to protect them when they are threatened – as women -- in their workplaces.

III. Former Dean Bullock's Perjury Requires that the Jury's Verdict be Vacated

In her July 1, 1999 memorandum, Dean Bullock admitted that she understood that Harrison was targeting *women* to "stalk" and "otherwise harass." (Pet. A-196) Her trial testimony to the contrary constitutes perjury. For *the first time*, Howard denies that Prof. Bullock committed perjury at trial. In the D.C. Circuit, Prof. Bullock actually responded to the charge of perjury by arguing that *perjury does not constitute fraud upon the court!* [14] (Bullock Brief at 15) Prof. Bullock specifically waived her right to file an Opposition to Certiorari. Howard cannot make new factual assertions and denials at the Supreme Court level.

Where a party has committed perjury, "there can be no doubt that the judgment was unfairly

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[14]*See Pl's Rep*ly MJSexH (#483) at 1-3 (**JA**10,152-10,1554); Pl's Reply MJRet (#489) at 2-4 (**JA**10,244-10,246).

obtained...." *Devon Distributing Corp. v. Minor,* 2007 WL 4348069 at *4 (S.D. Iowa 2007). Accord, *Evans v. Commercial Bank and Trust Co.,* 2003 WL 22871619 (Bankr. W.D. Tenn 2003); *United Coin Meter Co. Evans v. Commercial Bank and Trust Co.,* 2003 WL 22871619 (Bankr. W.D. Tenn 2003); *Seaboard Coastline R.R.*, 705 F.2d 839, 844-845 (6th Cir. 1983); *Abrahamsen United Coin Meter Co. v. Seaboard Coastline R.R.*, 705 F.2d 839, 844-845 (6th Cir. 1983); *Trans-State Exp., Inc.*, 92 F.3d 425, 428 (6th Cir. 1995), as modified by *Jordan v. Paccar, Inc.*, 1996 WL 528950 (6th Cir. 1996).

This wrongly procured verdict must be vacated.

IV.Howard Fails to Acknowledge that Judge Hogan's 1999 Decision Resolved a Motion for Summary Judgment, Determining Facts

Howard's Brief, at 11, states:

> ... Martin asks again whether the district court violated due process, the law of the case doctrine, or Rule 56(d)(1) when it asked the jury to resolve the disputed factual question of whether Harrison's conduct was "based on sex." Inexplicably, Martin (a licensed attorney) continues to believe that a statement made in the course of denying a motion to dismiss at the initial pleading stage of litigation the legal effect of taking the factual determination of whether Mr. Harrison's conduct was "based on sex" away from the jury. Martin is wrong...

"Inexplicably," Howard's counsel, a partner in Venable, LLC, a major EEO defense law firm,

refuses to acknowledge that Howard's 1999 motion was both a motion to dismiss *and for summary judgment*. He further *mocks Ms. Martin* for *understanding* this fact and applying Rule 56(d)(1).

Judge Hogan's 2006 *conclusory statement about what said in 1999* is not evidence of *what he actually said in 1999. The proof of what Judge Hogan said in 1999 is the 1999 opinion itself.* In 1999, based on the undisputed facts, Judge Hogan properly determined that Harrison's harassment of Prof. Martin was sexual in nature and/or based on her gender. 1999 U.S. Dist. LEXIS 19516 (D.C.D.C. 1999) at 8-11 (A-25-28).

Howard quotes Judge Hogan 2006 statement that Ms. Martin's arguments "border on the frivolous" because she had previously raised them and lost (2006 U.S. Dist. LEXIS 34446 at *5, A-150); however, they were not frivolous simply because she lost them. The dismissal was erroneous when it was decided in 2003 and for additional reasons, based on cases decided thereafter. *Pet.* at 32-33.

Chappelle-Johnson v. Powell, 440 F.3d 484 (D.C. Cir. 2006) upheld a retaliation case where the plaintiff was deprived of the *opportunity* to compete for a position. Prof. Martin was similarly deprived of *an opportunity to be considered* for a position because Dean Bullock withheld and concealed vacancies. *See also Wiley v. Glassman,* 2007 WL 4354431 at * 4 (D.C. Cir. 2007) (radio station excluded plaintiff radio broadcaster from the managing editor rotation); *Holcomb v. Powell*, 433 F.3d 889, 902 (D.C. Cir. 2006); *Rochon v. Gonzales*, 438 F.3d 1211 (D.C. Cir. 2006); *Mastro v Potomic Electric Power Company*, 447 F.3d 843, 855 (2006).

Ms. Martin's *Motion for Summary Judgment* on these issues was *never considered* on the merits.

This dismissal should be reversed. If these claims are considered and restored, Ms. Martin is entitled to judgment, as a matter of law, for the reasons stated in her MSJ at 41-44 (**JA**5,798-5,801).

Howard claims that Prof. Martin was not "a full time professor" at Howard. Ms. Martin was a *full-time Visiting Associate* Professor at Howard, with a full course load. Her 1997-1998 salary was $83,000 per year, plus a $3,000 summer grant, for a total salary of $86,000, with health, life and retirement benefits. She had a faculty office, office hours, faculty meeting obligations, full faculty voting rights, committee obligations and publishing obligations. JEXs 24 (**JA**13,749) 28 (**JA**13,758), 29 (**JA**13,760), 32 (**JA**13769), 33 (**JA**13,770), 35 (**JA**13,771), 47 (**JA**13,788), 65 (**JA**14,000). This was not a "part-time" or "adjunct" position.

Even if Prof. Martin had not been a full time faculty member, she would be entitled to reinstatement -- or appointment -- to a position as a full-ranked, tenured Professor. The junior, lower ranked *Visiting Assistant* Professor, christi cunningham, who was selected for the position, is now a tenured, full-ranked Professor. JEX 4 at 9013 (**JA**13,635), 9028 (**JA**13,650). The relief that Ms. Martin requests is precisely the "make whole" relief necessary to place her in the position that she would hold today, but for the illegal retaliation.

V. Howard Misrepresents the Character of Ms. Martin's Daughter, at Age Eleven

In its Brief, at 7, Howard has even stooped so low – *again*-- as to mischaracterize an *eleven year old girl* with respiratory problems as a "teenager with problems in school and with her health." Prof. Martin's March 12, 1995 letter actually states that

her daughter is *eleven years old child* with allergies and sinus problems aggravated by Cleveland winters.[15]

Moreover, Prof. Martin's March 12, 1995 inquiry is irrelevant to any issue in this case. It had no bearing on how she was hired for the 1996-1997 academic year – and certainly has no bearing on why she was "not renewed" in 1998. All of Howard's witnesses testified that Howard recruited Prof. Martin when she participated in the November 1995 AALS Recruitment Conference, where she had interviews at other schools, for positions for the 1996-1997 academic year.

Ms. Martin corrected Howard's misrepresentations in her D.C. Circuit March 11, 2008 *Motion for Sanctions* at 12, Exhibit A, at 22-27; yet Howard and its attorneys continue to viciously misrepresent not only Ms. Martin's character, but even that of her little girl. Howard continues to superfluously inflict additional injury upon Ms. Martin and her family – without conscience or ethics -- because no court has yet held them accountable for it. Ms. Martin's daughter is *an extraordinary young woman* in her own right.[16] Howard should not be permitted to malign her childhood character with impunity.

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[15] JEX 120 (**JA14,253**).

[16] Danielle is now a published author, teaching at a university herself, at age 24. Her credits are described by Collins Literary Agency, at http://www.marcovigevani.com/upload/london_2008/Collins_Literary_London_2008_Rights_List.pdf, as well as numerous other websites. One of her short stories is included in the 2008 Anthology of Best American Short Stories, edited by Salmon Rushdie.

CONCLUSION

The Petition should be granted.

Respectfully submitted,

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